

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling of)	CC Docket No. 01-338
WorldCom, Inc. for a Ruling that ILECs)	
Are Prohibited from Imposing Use)	
Restrictions on UNEs such as LIDB)	

OPPOSITION OF SBC COMMUNICATIONS INC.

I. INTRODUCTION AND SUMMARY.

In the *UNE Remand Order*,¹ the Commission required an incumbent LEC to provide access to call-related databases, including the Line Information Database (LIDB), as UNEs only to support entry into the local telecommunications services market. This limitation is apparent from the Commission's unbundling analysis for call-related databases. In particular, the Commission ordered ILECs to grant access to LIDB and other call-related databases not because of any concerns about competition in the interexchange market but rather in order to promote competition, innovation and investment in local telecommunications markets. Indeed, the Commission's necessary and impair analysis focused exclusively on local telecommunications markets, and did not mention interexchange services even once. The fact that it did not do so clearly establishes that the Commission did not intend to require ILECs to provide access to LIDB and other call-related databases as UNEs for interexchange services.

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1996) (*UNE Remand Order*), *vacated and remanded USTA v.*

Even if the Commission had so intended, any such requirement would be unlawful. In *USTA v. FCC*, the D.C. Circuit vacated and remanded the Commission's network unbundling rules because the Commission failed to engage in a market-specific analysis of the need for particular UNEs and ignored the social costs of unbundling.² The court found that, as a result, the Commission unlawfully had required unbundling in markets where there was no reasonable basis to conclude that competition was suffering from the sort of impairment Congress had in mind in requiring ILECs to provide access to UNEs. In light of the robust competition for interexchange services, which has developed without access to LIDB as a UNE, the Commission could not reasonably conclude that requesting carriers are impaired in their ability to offer interexchange services without unbundled access to LIDB. Nor, therefore, could it lawfully require ILECs to provide unbundled access to such databases for interexchange services. The Commission therefore should reject WorldCom's petition to declare that requesting carriers can access LIDB as a UNE to provide interexchange and exchange access services.³

FCC, 00-1012, Slip Op. (May 24, 2002) (*USTA v. FCC*), *reh'g denied* (Sept. 4, 2002) (*Rehearing Order*).

² *USTA v. FCC*. In denying rehearing, the court stayed the vacatur of the "Commission's orders" (i.e., the *Line Sharing Order* and the *UNE Remand Order*) until January 2, 2003 to give the Commission time to complete its *Triennial Review* proceeding. *Rehearing Order*, citing the *Triennial Review* proceeding.

³ Although the focus of its petition is on obtaining access to LIDB as a UNE to provide interexchange services, WorldCom also asks the Commission to clarify that it may use LIDB as a UNE to "provide" exchange access services. Presumably, WorldCom seeks such clarification so that, if the Commission confirms that an interexchange carrier cannot access LIDB as a UNE to provide long distance services, it still could access LIDB to provide exchange access to itself for the provision of such services. However, the Commission has ruled that an interexchange carrier seeking to originate or terminate its own interexchange traffic "is not offering access [services], but rather is only obtaining access [services] for its own traffic." *Local Competition Order*, 11 FCC Rcd 15499, 15598-99 (1996). And, while the Commission found in the *Local Competition Order* that an interexchange carrier could purchase UNEs to provide exchange access to itself to provide interexchange services to consumers, it did so based on its erroneous

II. ILECs MUST PROVIDE ACCESS TO LIDB AS A UNE ONLY TO SUPPORT ENTRY INTO THE LOCAL TELECOMMUNICATIONS MARKET.

In its petition, WorldCom asserts that a requesting carrier may purchase access to LIDB at UNE rates for all telecommunications services, and that any restriction on a carrier's use of LIDB as a UNE to local calls is contrary to the Act and the Commission's rules. In particular, it claims that, in the *UNE Remand Order*, the Commission required ILECs to provide access to LIDB as a UNE,⁴ and that, under section 251(c)(3), "a requesting carrier can use unbundled network elements for the provision of *any* telecommunications service."⁵ It further claims that the Commission has interpreted section 251(c)(3) to prohibit restrictions on the use of UNEs, and codified that interpretation in section 51.309(a) of the Commission's rules.⁶ WorldCom argues

conclusion that section 251(c)(3) prohibits use restrictions. *Id.* at 15679. The Commission now has repudiated that interpretation, and concluded that Congress did not intend to compel the Commission, once it determines that a network element meets the impair standard for the local exchange market, to grant access to that element solely or primarily for use in the exchange access market. *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587, paras. 12-15 (2000) (*Supplemental Order Clarification*). In any event, a carrier that provides only exchange access services would not (and indeed would have no need to) access LIDB to provide such services. Only a provider of telephone exchange service or interexchange service would have any need to access the LIDB database to provide such services. Moreover, the Commission previously has determined that a requesting carrier may not use unbundled local switching, shared transport, or loops to provide exchange access services for a particular end user unless such carrier also provides local exchange services to that end user. *Local Competition Order*, 11 FCC Rcd 15499, at para. 357 (2001); *Local Competition, Order on Reconsideration*, 11 FCC Rcd 13042, 13049 (1996); *Local Competition, Third Order on Reconsideration*, 12 FCC Rcd 12460, 12484 (1997). As such, it is difficult to conceive how WorldCom or some other carrier could provide exchange access services to an end user unless it also provided that customer telephone exchange service — in which case, it could access LIDB.

⁴ WorldCom Petition at 5, citing *UNE Remand Order* at para. 402.

⁵ *Id.* at 3-4, citing 47 U.S.C. § 251(c)(3) (emphasis added).

⁶ WorldCom Petition at 4, citing 47 C.F.R. § 51.309(a).

that, consequently, it and other requesting carriers can access LIDB as a UNE solely to provide interexchange and exchange access services. WorldCom's claims are wholly without merit.

In the first place, WorldCom's contention that the 1996 Act prohibits use restrictions on UNEs is based on a fundamental misreading of the Act. In particular, WorldCom repeats here its oft-stated claim that section 251(c)(3) provides that a requesting carrier can use UNEs for the provision of "any" telecommunications service. In fact, however, section 251(c)(3) states that an ILEC must provide a requesting carrier access to network elements "for the provision of *a* telecommunications service," not for "*any* telecommunications service."⁷ When Congress intended to use the term "any," it did so, as in the preceding clause of section 251(c)(3) ("any telecommunications carrier"). This difference in terminology must be presumed to be intentional.⁸ The language and structure of section 251(c)(3) thus make clear that the reference to "a telecommunications service" identifies the outer boundaries of the purposes for which a requesting carrier may access UNEs, not the terms and conditions under which the incumbent must provide such access.

Moreover, WorldCom's claim that section 251(c)(3) forbids any restrictions on the use of UNEs is flatly inconsistent with the Supreme Court's decision in *AT&T v. Iowa Utils. Bd.* In that case, the Court rejected the notion that section 251(c)(3) identifies which network elements must be unbundled, and establishes an underlying duty to make all elements available.⁹ It found that,

⁷ 47 U.S.C. § 251(c)(3). Indeed, during oral argument before the D.C. Circuit on CompTel's and WorldCom's challenge to the EEL local usage requirements in the *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000), Judge Williams observed that the word "any" appears nowhere in section 251(c)(3) in response to claims that section 251(c)(3) requires ILECs to provide access to UNEs for "any" telecommunications service.

⁸ *Russello v. United States*, 464 U.S. 16, 23 (1983).

⁹ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, at 736 (1999) (*AT&T v. Iowa Utils. Bd.*).

to the contrary, it is *section 251(d)(2)* that requires the Commission to determine which network elements must be made available.¹⁰ And section 251(d)(2) specifically directs the Commission to consider “the services that [the requesting carrier] seeks to offer” in analyzing impairment and determining which network elements must be unbundled.¹¹

The Commission itself has rejected the claim that section 251(c)(3) prohibits use restrictions on UNEs. Based on *AT&T v. Iowa Utils. Bd.*, the Commission has acknowledged that section 251(d)(2), not 251(c)(3), is the proper focus for its unbundling inquiry, and determined that section 251(d)(2) did not “compel [the Commission], once [it] determine[s] that any network element meets the ‘impair’ standard for one market, to grant competitors access to that same network element solely or primarily for use in a different market.”¹² The Commission thus has concluded that section 251(c)(3) does not preclude a service-specific analysis for determining whether a requesting carrier may obtain access to a particular network element.¹³

In the *UNE Remand Order*, the Commission made clear that an ILEC must provide unbundled access to LIDB and other call-related databases only to support entry into the local telecommunications services market, not interexchange markets. In particular, in requiring ILECs to unbundle LIDB and other call-related databases, the Commission focused exclusively on the local market: “we find that lack of access to call-related databases on an unbundled basis would materially impair the ability of a requesting carrier to provide the services it seeks to offer

¹⁰ *Id.*

¹¹ 47 U.S.C. § 251(d)(2).

¹² *Supplemental Order Clarification* at para. 15.

¹³ *Id.*, see also *USTA v. FCC* (vacating and remanding the Commission’s unbundling rules because the Commission failed to engage in a market-specific analysis of the need for particular UNEs).

in the *local* telecommunications market.”¹⁴ Nowhere in its unbundling analysis for LIDB did the Commission say a single word about the interexchange market, much less consider whether interexchange carriers would be impaired in their ability to offer interexchange services without access to LIDB as a UNE. In light of the robust competition for interexchange services, which has developed without unbundled access to LIDB, the fact that it did not do so plainly reveals that the Commission did not intend to require ILECs to provide LIDB as a UNE to interexchange carriers.

It is no answer to claim, as WorldCom does, that section 51.309(a) of the Commission’s rules precludes an incumbent LEC from “impos[ing] limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of requesting a telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.”¹⁵ That rule applies only if the function at issue — access to LIDB to support interexchange services — is part of the LIDB UNE. But, as discussed above, the Commission did not intend to require ILECs to provide unbundled access to LIDB for interexchange services. Section 51.309(a) therefore is beside the point.

In any event, the Commission never has concluded that a requesting carrier would be impaired in its ability to provide interexchange services if it were denied access to LIDB as a UNE, nor could it, based on the vigorous competition for interexchange services that has

¹⁴ *UNE Remand Order* at para. 410 (emphasis added). See also *id.* at para. 411 (“We believe that access to call-related databases, such as LIDB . . . promotes the ability of new entrants and established competitors to provide service in the *local exchange market*.”) (emphasis added); *id.* at para. 417 (“Requiring incumbent LECs to provide access to call-related databases . . . will foster investment and innovation in the *local* telecommunications marketplace. Requesting carriers require access to call-related databases . . . to provide the services they seek to offer in the *local* telecommunications market.”) (emphasis added).

¹⁵ WorldCom Petition at 4, citing 47 C.F.R. § 51.309(a).

developed without unbundled access to LIDB. Precluding an interexchange carrier from accessing LIDB as a UNE would not violate section 51.309(a), which only precludes limitations or restrictions that “impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.”¹⁶

Even if the Commission did intend to require ILECs to provide interexchange carriers access to LIDB as a UNE, such a requirement would be unlawful under the D.C. Circuit’s opinion in *USTA v. FCC*. In that case, the D.C. Circuit vacated and remanded the Commission’s unbundling rules because, in determining which elements must be unbundled, the Commission failed to afford sufficient weight to the social costs of unbundling, and ordered unbundling in many markets in which “there [was] no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have [been] the object of Congress’s concern.”¹⁷ The court further rejected the Commission’s line-sharing requirements because the Commission ignored robust competition in the broadband market in applying its impairment analysis to ILEC facilities used to provide broadband services.¹⁸ The court concluded that the Commission may not “inflict on the economy” the social costs of unbundling in markets that already are competitive.¹⁹

¹⁶ The Commission reached the same conclusion in the *Supplemental Order Clarification*. *Supplemental Order Clarification* at para. 15, n.47 (noting that Rule 309(a) “addresses limitations on the use of network elements ‘that would *impair* the ability of a requesting carrier’ to offer particular services”) (emphasis in original).

¹⁷ *USTA v. FCC*, Slip Op. at 12, 20.

¹⁸ *Id.* at 22-24.

¹⁹ *Id.* at 24.

In requiring ILECs to provide unbundled access to LIDB and other call-related databases, the Commission did not consider whether interexchange carriers are impaired in their ability to provide interexchange services without access to LIDB as a UNE. Rather, as discussed above, the Commission limited its impairment analysis solely to the local market. The Commission also did not consider the robust competition that has developed for interexchange services without access to LIDB at UNE rates, and explain how, in light of such competition, requesting carriers could be impaired in their ability to provide interexchange services without unbundled access to LIDB. Nor did the Commission consider the adverse impact unbundling of LIDB for interexchange services would have on investment by alternative vendors of LIDB data. Consequently, even if the Commission intended to require ILECs to provide unbundled access to LIDB for interexchange services, such a requirement would be unlawful under *USTA v. FCC*. As such, the Commission could not reasonably interpret its existing rules to require such a result.

III. LIMITING UNBUNDLED ACCESS TO LIDB DOES NOT CONSTITUTE UNLAWFUL DISCRIMINATION.

WorldCom further asserts that any restriction on the use of UNEs would violate the requirement in section 251(c)(3) that ILECs provide “nondiscriminatory access to network elements on an unbundled basis.”²⁰ In addition, it claims that use restrictions “violate the regulatory requirement that a CLEC’s access to a UNE must be equal to that which the ILEC provides to itself.”²¹

²⁰ WorldCom Petition at 5, citing 47 U.S.C. § 251(c)(3).

²¹ WorldCom Petition at 6, citing 47 C.F.R. § 51.311(b).

Once again, WorldCom's claims are without foundation. The nondiscrimination requirement in section 251(c)(3) of the Act and section 51.311(b) of the Commission's rules come into play only to the extent an ILEC is obligated to provide access to a network facility (or the features, functions and capabilities of that facility) as a UNE. But, as discussed above, the Commission has not required ILECs to provide requesting carriers unbundled access to LIDB for the provision of interexchange services. Consequently, the nondiscrimination requirement in section 251(c)(3) of the Act and section 51.311(b) simply do not apply.

IV. CONCLUSION.

The Commission therefore should reject WorldCom's petition.

Respectfully submitted,

/s/ Christopher M. Heimann
Christopher M. Heimann
Gary L. Phillips
Paul Mancini

SBC COMMUNICATIONS INC.
1401 Eye Street, N.W.
Washington, D.C. 20005
202-326-8909 – phone
202-408-8745 – facsimile

Its Attorneys

September 12, 2002

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of **Opposition of SBC Communications Inc.** has been served on the parties below via first class mail – postage prepaid on this 12th day of August 2002.

By: /s/Anisa A. Latif
Anisa A. Latif

Kecia Boney Lewis
Lisa B. Smith
WORLDCOM, Inc.
1133 19th Street, NW
Washington, D.C. 20554